SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 469

GEORGE ABERNATHY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—MAIN 1-5647

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GEORGE ABERNATHY,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

The petitioner George Abernathy prays that a writ of certiorari issue to review the judgments of the Supreme Court of Ohio made and entered by said Court on the nineteenth day of June, 1963, which judgments are appended here as Appendixes I and II.

OPINIONS OF THE COURT BELOW.

No opinion was rendered by the Trial Court.

The Ohio Court of Appeals upon consideration of an appeal to it likewise did not render either an official or unofficial opinion, save a mere journal entry affirming the judgment of the Trial Court. (See Appendix III.)

No formal opinion was rendered by the Supreme Court of Ohio and Petitioner's Motion for Leave to Appeal and his Appeal as of Right were dismissed. Copies of these entries made by the Supreme Court of Ohio were referred to above, i.e., Appendixes I and II.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A., § 1257(3), which section pertinently provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *, (3) by writ of certiorari * * * or where any title, right, privilege or immunity is specially set up is claimed under the constitution."

This cause also involves the introduction in a state court of evidence seized in violation of the Fourth and Fourteenth Amendments of the United States Constitution.

QUESTION PRESENTED FOR REVIEW.

I.

Where local police officers, without a warrant either to arrest or search, and also while acting without probable cause to arrest, forcibly enter a private apartment and place all of the occupants, including the accused, under arrest, following which they seized from him certain contraband, have the federally guaranteed rights of such an accused been violated?

II.

May the contraband, i.e., narcotics, seized by local police officers under the circumstance of this cause, be introduced into evidence in a state court prosecution for possession of such contraband?

III.

Must the identity of an alleged informer be disclosed for a fair determination of the question of probable cause, where the local police officers claim they have confidential information from such informer, upon which they rely as a predicate for forcibly entering, without a warrant, a private apartment and arresting and searching the occupants?

IV.

Where no exigent circumstances are shown, can a private dwelling be searched without a warrant?

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United *States; nor shall any State deprive any person of life, liberty or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

STATEMENT OF THE CASE.

George Abernathy was indicted for and convicted of a violation of R. C. of Ohio, § 3719.02, wherein it was charged that on the 16th day of August, 1961, he had in his possession, or under his control, certain illegal narcotic drugs. Prior to trial the Petitioner filed his written Motion to Suppress certain evidence, which evidence, it was alleged, had been seized in violation of the Fourth Amendment to the United States Constitution, and that the use of evidence seized in defiance of the Constitution "is by that same authority inadmissible." This Motion, following an oral hearing, was denied. Also following a bench trial on the merits, the Petitioner was convicted and subsequently sentenced to the Ohio Penitentiary for an indeterminate period.

In due season Petitioner filed his Motion for a New Trial which was overruled and further perfected his appeal herein. The Ohio Court of Appeals, without an opinion, merely affirmed the conviction. In the Supreme Court of Ohio this Petitioner's Motion for Leave to Appeal was denied and his Appeal as of Right dismissed.

The transcript of the trial evidence hereinafter referred to as (R) shows as follows:

To support the allegations made in his Motion to Suppress, the defense called two of the arresting officers, i.e., Detectives Thompson and Jones. Both of these officers were members of the Cleveland Police Narcotic Squad and had reported for work on this date in question at or around 10 o'clock P.M.

Detective Thompson indicated in his testimony that they remained in the office for about two hours and fifteen minutes before leaving, and that when they did leave, their destination was 2025 East 77th Street (R. 9). This was the address where the Petitioner was arrested. Also ar-

rested at this time and place were one Leonard Ashford and Richard Williams, the tenant at that address (R. 12).

Detective Jones next gave evidence to the effect that they had received a call from an "informer" that directed them to this address (R. 19), and that they had gained entrance to apartment No. 22 after having listened in the private hallway for about 10 minutes to the conversation being held inside, and that upon hearing the word "smack" used they gained entrance after knocking on the door and identifying themselves as police officers. The officer further said that immediately upon entering they placed all the persons on the premises under arrest for narcotics (R. 15). More, that after placing them under arrest, they proceeded to search the apartment (R. 15).

More specifically, this officer testified (R. 17) that:

"Q. Prior to placing Mr. Abernathy under arrest you did not see anything that was secreted in his pockets, did you?

A. No, sir.

Q. And it was after these persons were placed under arrest that you conducted a thorough search of the premises, you and your brother officers?

A. Yes.

Q. Then all of the items that were found were found after you had entered the apartment?

A. Yes.

Q. And they were also found after you placed the persons inside the apartment under arrest?

A. Yes."

The Petitioner testified that he was visiting the home of Richard Williams and was seated on the couch when suddenly he heard the "tremendously loud knocking on the door" by the police demanding entrance and that when they did enter, it was with pistols drawn; whereupon, they forced all of them to sit on the couch with their hands up (R. 22).

For its evidence on the issues raised by our Motion, the State called Detective Thompson, who indicated that he had received a call from some "informer" to the effect that Richard Williams, Leonard Ashford and a fellow from Chicago had gone over to Williams' house to use some "stuff" (R. 36). Also, that upon receipt of this call, they went directly to the Williams' address, i.e., apartment No. 22, located on the third floor of this large apartment building (R. 39). It was further developed that there was a door at the front of the building proper through which entrance is gained to a corridor which in turn permitted visitors to use the stairs or the elevator to the upper floors (R. 39).

The officer was emphatic on the point that in going to this address he was relying exclusively on the reliability of his informer, and that when they entered into the hallways of the building, it was in reliance on the information that had been given them by the informer (R. 40).

Upon cross examination this officer was specifically asked to disclose the identity of this alleged informer (R. 41). To this quest for disclosure, the Court sustained an objection raised by the State to which a specific exception was taken (R. 40, 41).

Officer Thompson admitted that no effort was made to procure a search warrant, claiming instead that it would have been useless to do so (R. 40).

STATE OF THE PROCEEDINGS AT WHICH AND MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

Prior to trial Petitioner filed a Motion to Suppress the evidence on the ground that the arrest and subsequent search of the Petitioner was illegal and unconstitutional. Further that the search conducted was general and/or exploratory and that the use of any evidence so seized infringed on Petitioner's constitutional rights under the Fourth and Fifth Amendments of the United States Constitution.

These issues were further briefed and argued in the Trial Court, the Ohio Court of Appeals as well as the Supreme Court of Ohio. The Supreme Court of Ohio without the citation of any authorities dismissed these arguments with the notation:

> "The appeal as of right herein is dismissed for the reason that no debatable constitutional question is involved."

ARGUMENTS RELIED FOR THE ALLOWANCE OF THE WRIT.

Now the specific question raised by Petitioner's Motion to Suppress was essentially this: Was the arrest of the defendant and the search of the premises legal? If in fact the evidence sought to be suppressed by the Motion was obtained by an illegal search and seizure, it is not admissible over objections, by reason of the constitutional guarantees against illegal searches and seizures (invasion of privacy) and/or against self incrimination.

If an Arrest Is Unlawful, the Incidental Search Is Unreasonable and the Product of the Unreasonable Search Is Not Admissible to Convict.

I.

In resolving the question of legality, we start with the premise that a search which is unlawful in the beginning is not made lawful by what it discloses; *Henry v. United States*, 361 U. S. 98 (1959); or even by the discovery and seizure of contraband articles. *United States v. Jeffers*, 342 U. S. 49 (1951). Further, it is not necessary even that a defendant concede possession in his Motion to Suppress. *Jones v. United States*, 362 U. S. 257 (1960).

Legal searches are those conducted pursuant to a legal search warrant, or pursuant to a legal arrest, or with the consent of the suspect or of someone who has authority to consent to a search of the premises. Suffice it to say that in this whole area the greatest source of controversy involves a search made without a search warrant but pursuant to an arrest made without an arrest warrant. Such an arrest is generally valid (when such is the case a search incident thereto, if reasonable, is also valid) if it is for even a misdemeanor committed in the officer's presence. Cf. Revised Code of Ohio, § 2935.03 and § 2935.07.

Revised Code of Ohio 2935.03 provides:

> "A * * * police officer shall arrest and detain a person found violating a law of the State or an ordinance of a municipal corporation until a warrant can be obtained."

Revised Code of Ohio 2935.07 provides:

> "When an arrest is made without a warrant by an officer, he shall inform the person arrested of such

officers authority to make the arrest and the cause of the arrest * * *."

The evidence here is clear that at the point when the Petitioner and others were placed under arrest, they were not found violating a law of the State or an ordinance of the City, nor were they informed as to the cause of their arrest. Viewed from this posture, the conclusion is most compelling that the arrest was illegal in that the statutory grounds for an arrest without a warrant were not present.

II.

If the contention is made that R. C. of Ohio, § 2935.03 refers to misdemeanors and that it has always been the law that an officer who has "reasonable grounds" to believe that a felony has been or is being committed by a particular person, may validly arrest such person without a warrant; admittedly, in such a case the ensuing search reasonably incident to the arrest is not constitutionally unreasonable.

However, "reasonable ground" is synonymous with probable cause and exists when a man of reasonable caution would believe an offense is being or has been committed. The current test is whether a reasonable and prudent man in possession of the knowledge which has come to the arresting officer, would believe the person arrested is guilty of a criminal offense. *Draper v. United States*, 358 U. S. 307 (1959).

Measured by this standard it is cogently clear that there is here a complete lack of "probable cause," which really tends to force the conclusion that the real reason no warrant was sought was because the officers knew they could not qualify for the issuance thereof. See, *Giordenello v. United States*, 357 U. S. 480 (1958). The question then is whether or not this Court should rule that it takes

less evidence in Ohio to arrest and search without a warrant than it takes to do so with one. See Revised Code of Ohio, § 2933.22-2933.27. Cf., *Wong Sun v. United States*, 137 U. S. 471, 479-480, (1963).

A Reasonable Search Is a Search Which a Judicial Officer Has, in Advance, Certified as Reasonable and for Which He Has Defined the Object and Fixed the Boundaries.

Even if we assume that the officers here involved had probable cause for belief that contraband evidence subject to seizure was in the apartment, the doctrine is well settled: No degree of probable cause will allow a search of a home without a warrant. *Agnello v. United States*, 269 U. S. 33 (1925).

In *Agnello* cited above this Court ruled:

> "Save in certain cases as incident to arrest, there is no sanction in the decisions of the Courts, federal or state, for the search of a private dwelling house without a warrant * * *. Belief, however well-founded, that an article sought is in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause."

More recently, in *Jones v. United States*, 357 U. S. 493, 497 (1958) this Court, citing *Agnello* as its prime authority, held that the fact that the officers had probable cause to believe that defendant's house contained material being used in the commission of a crime was insufficient to justify the search without a warrant. In the words of that opinion: "* * * were officers free to search without a warrant merely upon probable cause to believe certain articles were within a home, the provisions of the Fourth

Amendment would be empty phrases and the protection it affords largely nullified."

Conceding that the fundamental purpose of the Fourth Amendment is to interpose the disinterested determination of a magistrate between the zeal of the police and the right to privacy, then surely the requirements of this guarantee cannot be met, by showing, as was attempted here, after the search, either that there must have been probable cause because the search bore fruit or that there was ample evidence to justify the issuance of a warrant —therefore none was required.

The Cleveland Police unfortunately are quick to assume that when they are convinced that they have unquestionable grounds to support a search, that obtaining a warrant in advance is a formality with which they can dispense for the sake of expediency. In their thinking on this score, it can be said that the extreme reluctance of Ohio's Courts (both Trial and Appellate) to openly condemn such tactics, and free oft-times obviously guilty defendants, has had the effect of a tacit approval thereof. This situation has been compounded by the lack of any really definitive opinions from the higher courts of Ohio on the myriad of problems under the doctrines of illegal searches and seizures. A perfect example of this is the cause here. Surely the issues raised herein were at least worthy of discussion by the Appellate Courts in the form of an opinion. For aught that appears these Courts, i.e., the Trial Court, Court of Appeals and the Ohio Supreme Court, could very well have based their reasoning on some constitutionally untenable theory.

The rule above referred to, as enunciated in *Agnello*, is emphatically to the point that: No officer may enter premises unless probable cause to arrest exists before such entry. This of course includes hallways of apartment,

outer doors, yards and the curtilage of private premises. Thus if entry is made into such a hallway merely to observe, and thus obtain "probable cause," the entry, the arrest and the incidental search are unlawful. *McDonald v. United States*, 335 U. S. 451, 454 (1948); *Burks v. United States*, 287 Fed. (2) 117, 124.

As regards this element of trespass, in *Silverman v. United States*, 365 U. S. 505 (1961), this Court ruled on the constitutionality, under the Fourth Amendment, of the use of a "spike microphone." This decision was perforce "based upon the reality of an actual intrusion into a constitutionally protected area." In taking this position, the Court obviously felt that the fact of an actual trespass distinguished *Silverman* from *On Lee v. United States*, 343 U. S. 747 (1952) where a narcotic agent with a concealed microphone on his person was invited onto the premises of the accused; and *Goldman v. United States*, 316 U. S. 129 (1942), where an amplifier was held next to a common wall. In these latter cited cases, i.e., *On Lee* and *Goldman*, the Court viewed the absence of an actual or even technical trespass as the basis for their decision that the amendment had not been violated. Surely the actual trespass here places this cause within the scope of *Silverman*.

If A Search Is Unreasonable For Any Reason, the Seizure of Any Evidence, Whether Contraband or Mere Evidence, Violates the Fourth Amendment.

In determining the question or reasonableness, where as here, the facts and circumstances establish that there was sufficient opportunity to obtain a warrant such will render the search unreasonable. A very limited exception to this rule is operative when the circumstances compel an immediate arrest on the premises. *Johnson v. United*

States, 333 U. S. 10 (1947). However, where, as here, the officers know in advance they will make a search of the premises, no excuse can justify not obtaining a warrant, provided they can qualify for one. And surely, if they cannot so qualify, they should not attempt the search.

This then brings forth the following query; that is, could the officers, on the facts known to them at the time of their original entry, have qualified for the issuance of a search warrant? For surely if it were not sufficient to qualify for an arrest warrant then it could not possibly be deemed probable cause to arrest without one. In this regard the following analysis is deemed significant.

First, search warrants are authorized under R. C. of Ohio, § 2933.21 et seq. Because these statutes protect the constitutional right to privacy, strict compliance is required and must be strictly construed. *Sgro v. United States*, 287 U. S. 206 (1932). Next, the Fourth Amendment and our State counterpart provides:

> "And no warrant shall issue but upon probable cause supported by oath or affirmation * * *."

It is submitted that on this "alleged" information no neutral and detached magistrate would have issued warrant to search these premises or to arrest anyone. Accordingly it has been said that: "* * * unless the magistrate makes his independent judgment on all the known facts, then he tends to become merely the tool of police interest." *Jones v. United States*, 362 U. S. 257, 273 (1960).

On the other hand, let's assume that the officers had a warrant. Our code specifically provides that an officer may break down an outer door or inner door or window of a dwelling house or building if after notice of his intention to make a search pursuant to a warrant he is refused admittance. R. C. of Ohio, § 2935.12. This formality,

which requires the police to say who they are and state why they demand admittance, is of ancient vintage, going all the way back to the 15th century in the English Common Law. Thus, an otherwise valid search can deteriorate into the zone of "unreasonableness" merely by failure to comply with the statute relative to execution thereof. Of considerable importance in this phase of our contentions is the case of *Miller v. United States*, 357 U. S. 301 (1958). In *Miller* this Court reversed the conviction of a notorious, and undoubtedly guilty, narcotic peddler simply because the police, who broke into his apartment and found a large quantity of heroin, neglected to first announce their purpose and authority in demanding entrance.

The point is worth repeating. Even if the particular officers in this present cause had been armed with the necessary warrant, a proper notification would have been required. Surely, it would be a fantastic absurdity to say that there are fewer restrictions on an officer proceeding without a warrant than would be the case if he had one.

Where the Identity of an Alleged Informer Is Material to the Establishment of Probable Cause, the Court Should Require Disclosure.

In their testimony the officers attempted to justify their actions on the basis of information allegedly supplied them by an "informer" (R. 19, 40, 41). The Petitioner specifically requested that he be afforded the identity of this alleged informer and even initiated a line of inquiry designed to attain that end. In view of the Court's ruling on the State's objection, such information was not forthcoming. Now the rule that an informer's tip may supply "probable cause" for an arrest and search must be regarded as subject to numerous qualifications. See, *Jones v. United*

States, 362 U. S. 257 (1960), *Draper v. United States*, 358 U. S. 307 (1959). The narrow purview of our discussion at this juncture is concerned with the propriety of the Court's ruling against the disclosure of the identity of the alleged informer.

At the outset it is clear that Ohio does not give a statutory privilege of confidentiality as between the police and an informer. Revised Code of Ohio, § 2317.02. Further the Ohio Supreme Court has expressly held in a long line of cases that "* * * a privilege against testifying or producing evidence must rest upon some statutory or constitutional provision." *Re: Story*, 159 Ohio St. 144, 111 N. E. (2) 385 (1953).

From a bare reading of Ohio's privilege statute which does not expressly confer such status to the policeman-informer relation, the mere invocation of the doctrine of "expressio unius est exclusio alterius" should be most compelling. Be that as it may, even in jurisdictions where the privilege exists, the disclosure of the identity is required in order to allow a challenge to the validity of an arrest or the propriety of the issuance of a warrant. This limitation on the applicability of the privilege arises from the fundamental requirements of due process. The problem has been said to involve the balancing of the public interest, in protecting the flow of information, against the individual's rights to have issues raised by his defense properly determined. *McCormick on Evidence*, § 148.

The constitutions of both Ohio and the Federal government prohibit the issuance of warrants except upon "probable cause." This thought is also memorialized by statute in the Ohio Revised Code, § 2933.22. In this regard, one of the prime issues raised by our Motion in the Trial Court, and both of the Appellate Courts, was the alleged

non-existence of probable cause. Certainly in this posture, the reliability of the informant, the credibility of the police officer who claims he acted upon the information disclosed, and the soundness of the reason for reliance upon this so-called information, are proper matters for exploration by the defense. Thus it is the law that an accused is entitled to know the identity of the informer, to compel his testimony and to impeach his credibility. *Roviaro v. United States*, 353 U. S. 53 (1957).

As was declared by one authority: If the prosecution is not required to divulge the name of an informant when one is arrested on the alleged ground of "confidential information," the way is left open for the "phantom informer." Further, that although this possibility may be remote, the fact that the possibility exists at all, when it can be eliminated, violates the American concept of justice in a criminal trial. *People vs. Lawrence*, 149 Cal. App. (2d) 435, 308 Pac. (2) 821 (1959). Cf., *Priestly vs. Superior Court*, 50 Cal. (2d) 812, 317 Pac. (2) 796 (1957).

When the identity of an informer becomes material to the establishment of a defense, the Court should order its disclosure. This, of course, is perfectly consistent with this Court's views as expressed in *Roviaro* (cited above).

Certainly where a determination of the lawfulness of a search and seizure depends upon the disclosure of the identity of the individual who allegedly gave information which led to the search and seizure, failure to require such person's identity to be disclosed, should render the search unlawful and result in a requirement that the evidence obtained from the search and seizure be excluded. *United States vs. Blich*, 45 Fed. (2d) 627 (1930, DC Wyo.).

By the Court not requiring disclosure, the status of this alleged confidential source became reduced to an anonymity. Certainly, if identity were disclosed, the de-

fense could have explored the reliability of the informer, produced evidence to rebut any such showing as well as further show that reasonable grounds for reliance did not exist. Further, it is just as important to a defendant to have access to a material witness who may satisfy the Court that evidence against him should be excluded, because obtained by unconstitutional means, as to have access to a material witness who may give evidence which will overcome in the eyes of a jury, for example, prosecution evidence against him on the merits of the charge.

CONCLUSION.

We are therefore left, upon an objective examination of the evidence, with an arrest executed without a warrant and without reasonable ground for believing a sufficient crime had been committed; with a search conducted without consent and without warrant or other process of law and in defiance of the constitution.

The Supreme Court of the United States has ruled, "That all evidence seized in violation of the constitution, is by that same authority, inadmissible in a State Court." Thus the "exclusionary rule" has, by the command of the Federal constitution become the law of the State of Ohio.

It follows as a most compelling conclusion that the only evidence against the Petitioner was the product of an unconstitutional search. Such being the case it is also most clear that if this evidence had been properly excluded, evidence to justify a conviction would have been "conspicuous by its absence." Fortunately, as an Appellate Court and with the power of judicial hindsight the error can be rectified. With a total absence of credible evidence to support the charge, this Court should remand the cause to the State Court with proper instructions as to any future disposition.

Wherefore, Petitioner respectfully prays that a writ of certiorari be issued under seal of this Court directed to the Supreme Court of Ohio to the end that the judgment of the Ohio Courts may be reviewed and reversed if such is indicated by this Honorable Court.

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Of Counsel.

APPENDIX I.

ORDER OF SUPREME COURT OF OHIO DISMISSING APPEAL.

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no debatable constitutional question exists herein.

TAFT, C. J. and ZIMMERMAN, MATTHIAS, O'NEILL, GRIFFITH and HERBERT, JJ., concur.

APPENDIX II.

ORDER OF THE SUPREME COURT OVERRULING MOTION FOR LEAVE TO APPEAL.

It is ordered by the Court that this Motion is overruled.

APPENDIX III.

JOURNAL ENTRY OF THE COURT OF APPEALS OF OHIO, EIGHTH DISTRICT, COUNTY OF CUYAHOGA.

April 1, 1963.

This cause came on to be heard on the appeal on questions of law from the judgment and sentence of the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment and sentence of the Common Pleas Court are affirmed and it is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue of this Court directing the Common Pleas Court to carry this judgment into execution. Exceptions.

JOY SETH HURD,
Presiding Judge.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 469 [redacted]

GEORGE ABERNATHY,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 469 Misc.

GEORGE ABERNATHY,

Petitioner,

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STATE OF OHIO,

Respondent.

BRIEF OF RESPONDENT
In Opposition to Petition for Writ of Certiorari.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION.

There is no substantial federal question involved which would require this Court to review this case.

The Ohio courts decided this case in accordance with the statutes of the State of Ohio and in accordance with the Constitution of the United States and the applicable decisions of this Court.

The questions herein presented were raised both in the Court of Appeals of Cuyahoga County and the Ohio Supreme Court. The Court of Appeals affirmed without writing an opinion, and the Ohio Supreme Court refused to certify and review.

The decisions of the state court were based on state law. There is, therefore no substantial federal question involved.

QUESTIONS PRESENTED.

The Petitioner claims:

I. That local police officers violated his constitutional rights against unreasonable search and seizure in that they forcibly entered a private apartment and seized contraband, namely, heroin, a derivative of opium.

II. That the narcotics so seized were offered and received in evidence in a prosecution for possession of such contraband narcotics.

III. That the prosecution was under a duty to disclose the name of the informer who gave the police officers the information which led to the arrest and the search without a warrant.

IV. That there were no exigent circumstances sufficient to permit the search of a private dwelling without a search warrant.

THE CONSTITUTIONAL PROVISIONS INVOLVED.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce

any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE.

At about 1:10 A. M. on August 16th, 1961, Detectives Leslie Thompson, William Mariner, and Bernard Jones of the Narcotics Squad of the Cleveland Police Department received information that there was narcotic activity in apartment 22 of 2025 East 77th Street in Cleveland, Ohio. Acting upon this information, the three officers went to apartment 22 at that address, and upon arriving there, Detectives Mariner and Jones listened outside the door for about ten minutes (R. 48).

While these officers were listening they heard footsteps of individuals inside and the sound of glass breaking and also heard a male voice exclaim, "This is a good smack. It almost puts me to sleep." Upon questioning, Detective Jones indicated to the court that the exclamation quoted meant to him that someone was using heroin (R. 49).

These officers continued to listen at the door and then made their presence known by knocking at the door and identifying themselves in loud voices as members of the Police Department (R. 49). As they waited for an answer to their knock on the door at which they were listening, another door opened behind them and a man said, in a loud voice, "You must be the police." This man returned through the door from which he came and then opened the door the police were knocking on. The detectives gained entrance to apartment 22 by this man's opening that door (R. 50).

Upon entering the apartment the officers observed George Abernathy, Leonard Ashford, and Richard Williams (R. 50). George Abernathy was almost directly across the room from the entrance way (R. 50).

When the officers entered the apartment, they placed the three men under arrest. George Abernathy was searched and two tinfoil packets were taken from his person (R. 51-52).

When questioned, George Abernathy replied, "I'm a dope fiend" (R. 52). The packets were marked and held as evidence. The three men arrested were conveyed to police headquarters and statements were taken from them. Further conversation was had with the defendant George Abernathy wherein he related that he had paid $250.00 to a man he had met at East 100th and Cedar Avenue and that he had purchased these drugs for his own use and had taken them to the East 77th Street address (R. 56). This statement was reduced to writing and later introduced into the evidence. It was known by the members of the Police Department that the apartment was listed to Richard Williams, known to have a previous conviction for narcotics.

In addition to the two tinfoil packets that were found on the person of the defendant, George Abernathy, other tinfoil packets were found on the ground outside of the bathroom window. The defendant admitted to the members of the Cleveland Police Department that these packages were his.

After officers Jones and Mariner had gained entrance into the apartment, Detective Thompson came up and made a search of the apartment. He found the bathroom window was opened about 12 inches (R. 18). He went downstairs to the area just under the window where he

found a broken hide-a-key case which was magnetized. It had been broken open and there were cellophane packets containing a white power. They were taken back to the apartment and were marked, initialed and submitted to the laboratory for analysis (R. 82). They were later shown to the defendant and he stated that he had thrown them out of the bathroom window (R. 83-84).

Mr. Lee Peters of the Cleveland Police Department was called as an expert witness for the State of Ohio. It was stipulated that the tinfoil packets found in the pocket of George Abernathy contained a prohibitive amount of heroin and that the packets that were found outside of the window also contained a prohibitive amount of heroin (R. 94-95).

The defendant took the witness stand and admitted, upon cross examination, that he used some "stuff"—narcotics (R. 105). He further admitted that he bought it from a fellow and that he had a tinfoil packet containing white stuff, that was found to be positive for heroin, in his possession at the time of his arrest. The defendant was found guilty of possession of a narcotic drug as charged in the indictment.

Prior to the taking of testimony, the defendant in his case, filed a motion to suppress the evidence. Upon oral hearing of the motion and after presentation of evidence and the law given to the court by the defendant, the motion was overruled and the trial went forward on the indictment charging the defendant with the unlawful possession of a narcotic drug, to-wit: Heroin on the 16th day of August, 1961. The above statement of facts was based upon testimony elicited at the trial.

ARGUMENT.

WHEN THERE ARE REASONABLE GROUNDS TO MAKE AN ARREST, THE INCIDENTAL SEARCH IS LEGAL AND ITS FRUITS ARE ADMISSIBLE TO CONVICT.

I. In the first section of his argument, after citing portions of Sections 2935.03 and 2935.07 of the Revised Code of Ohio, the petitioner makes the claim that "The evidence here is clear that at the point when the petitioner and others were placed under arrest, they were not found violating a law of the State nor an ordinance of the City, nor were they informed as to the cause of their arrest." He concludes that the arrest was illegal in that these statutory grounds for an arrest without a warrant were not present.

The evidence discloses that at about 1:10 A. M., members of the Cleveland police department had received information of narcotic activity in the apartment on East 77th Street, and also that the officers knew this apartment was leased to Richard Williams, who was known to them as having been convicted in connection with narcotics (R. 47, 48, 49).

As a safeguard in acting upon this information, the detectives, before they made any move, listened outside the door and obtained additional grounds to believe that a felony was being committed because of the language they heard used inside the apartment (R. 49). They also rapped on the door loudly and informed the occupants that they were police officers. Immediately upon their entering the apartment they saw sufficient evidence in plain view in the substances and debris on the table in front of the petitioner to show that a felony had been committed.

II. In the second section of his argument, the petitioner claims that there is in this case a complete lack of

probable cause for his arrest, and he equates "reasonable grounds" with "probable cause." In *Jones v. United States*, 362 U. S. 257 (1960), 4 L. ed. 2d 697, this Court said:

> In testing the sufficiency of probable cause for an officer's action even without a warrant, we have held that he may rely upon information received through an informant, rather than upon his direct observations, so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge. Draper v. United States, 358 U. S. 307, 3 L. ed. 340, 79 S. Ct. 340. We there upheld an arrest without a warrant solely upon an informant's statement that the defendant was peddling narcotics, as corroborated by the fact that the informant's description of the defendant's appearance, and of where he would be on a given morning (matters in themselves totally innocuous) agreed with the officer's observations. We rejected the contention that an officer may act without a warrant only when his basis for acting would be competent evidence upon a trial to prove defendant's guilt.

In the case of this petitioner, the record simply does not support his conclusion that the real reason the officers did not seek a warrant was because they knew they could not qualify for the issuance thereof. The officers had good reason to believe that a felony was being committed in the apartment at the time in question. Before arresting the three men the officers, applying human reasoning as to the information they already had, used reasonable caution in acting upon that information. The arrest being made with probable cause, any evidence procured as a result thereof could be used in the trial and was not a proper subject of a motion to suppress.

In the next section of his argument, the petitioner states that no degree of probable cause will allow a search

of a home without a warrant, citing as authority *Agnello v. United States*, 269 U. S. 33, even though the quoted portion excepts "certain cases as incident to arrest."

One of the tests of the reasonableness of a search to be determined by the court is whether a search warrant would have issued on probable cause. "Probable cause" is, of course, incapable of any exact definition applicable to all cases. It has been defined by this Court in *Brinegar v. U. S.*, 338 U. S. 160, as:

> Probable cause exists when facts and circumstances within the officer's knowledge, and of which they have reasonable trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a crime is being committed.

And in *Henry v. U. S.*, 361 U. S. 98, 102, 4 L. ed. 2d 134, as:

> Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed.

Therefore, in each case a question of fact is presented. It is apparent that here, when we take into consideration the fact that the officers received the information at 1:10 a.m. and the type of contraband involved in narcotic cases, there was no opportunity to obtain a search warrant. Without doubt there was probable cause for the issuance of a warrant but time was of the essence.

Petitioner's counsel premises his argument on his personal opinion that the Cleveland police are quick to make arrests without a warrant, for the sake of expediency "when they have unquestionable grounds to support a search," and in the next section of his argument he makes the claim that here there was sufficient opportunity to obtain a warrant. He does not set forth any facts to support this claim, but instead makes mention of the Ohio

statute which sets forth the conditions under which an officer may break down a door. In this case the officers did not use any force to gain entrance to the apartment. They were admitted by the voluntary acts of persons occupying the apartment. There was no trespass, actual or technical, such as was held to exist in the cases cited by the petitioner.

In this case the officers had reasonable grounds to believe that a felony was being committed; they had probable cause to arrest the defendant then and there, with or without a warrant; the search was made after and as an incident of the valid arrest of the defendant; and all evidence flowing from his arrest is therefore competent.

THE TRIAL COURT DID NOT ERR IN REFUSING TO COMPEL THE DISCLOSURE OF THE NAME OF THE INFORMER.

Petitioner claims that the identity of the informer, who supplied information to the police of activity in narcotics at the apartment where the defendant was arrested, was material to the establishment of probable cause for the arrest. The petitioner contends he was entitled to that information to test the reliability of the information upon which the officers acted.

A similar claim was considered by the Supreme Court of Ohio in *State v. Beck*, 175 O. S. 73 (decided June 26, 1963). Syllabus 2 of the *Beck* case holds:

> "2. It is not reversible error on the part of a trial court to refuse to order the disclosure of the identity of an informer, whose information led in part to the apprehension and arrest of an accused person, where such disclosure would not be helpful and beneficial to the accused in making a defense to a criminal charge lodged against him."

It is stated at p. 76 of the opinion:

> "As already noted, law-enforcement officers sometimes base a part of their activities on information supplied them by informers, and the only way to verify the reliability of such information is to make use thereof. Informers often frequent the vicinity where crime is planned, and the revelation of an informer's name would not only destroy his access to information concerning criminal activities but might also result in his sudden demise, thereby discouraging others from becoming informers.
>
> For many years, sound policy has indicated that the names of informers be kept secret. Only in an instance where an informer's identity would be beneficial and helpful to a defendant is there any basis for requiring disclosure. Here the officers acted on the information imparted by the informer plus additional knowledge already in their possession. The revelation of the name of the informer and the information supplied by him would not alter the fact of defendant's guilt. And a mere desire to test the credibility and reliability of the informer is hardly a compelling consideration in the circumstances narrated."

The opinion distinguishes the situation in the *Beck* case from that in *Roviaro v. United States*, 353 U. S. 53, 1 L. ed. 2d 639, where the informer not only gave information but took an active part personally in trapping and apprehending the offender. No such situation exists in the present case. Nor has the petitioner herein shown that the disclosure of the name of the informer would have been of real value to him.

CONCLUSION.

In concluding the argument on behalf of the prosecution, we believe it is always important to remember that in any trial involving the administration of criminal justice, or in a civil trial for that matter, there must remain error in record because of the human failures of those persons who are administering the law. This case, however, was tried to the court, the court sitting both as judge and jury to determine the facts, the credibility of the witnesses and to apply the pertinent law so as to come to a conclusion as to the guilt or innocence of the defendant.

The question here is to determine whether George Abernathy received a fair trial and that none of his constitutional guarantees under the Fourth Amendment were violated by the improper receipt of evidence which he claims was prejudicial to him.

The Court of Appeals of the Eighth Appellate District of Ohio concluded and held that after a careful reading of the bill of exceptions and consideration of the assignments of error (including the questions here presented) that no error intervened in the trial that was prejudicial to the substantial constitutional rights of the defendant or that prevented him from having a fair trial. The Ohio Supreme Court refused to review.

The entire record must be examined, not just a portion thereof but all matters pertaining to evidence, including the admissions of the defendant to members of the police department and his admissions in open court as to his participation in violating the narcotic laws of Ohio. It is at once evident that his basic defense is premised upon the original motion to suppress the evidence. We submit that it is clearly shown by the evidence adduced at the trial and at the hearing of the motion, that the police depart-

ment at the time the arrest was made, had ample information that a felony was being committed; consequently, they had probable cause to make the arrest. The respondent contends that the arrest was legal, and evidence of the search after the legal arrest and the articles of contraband it produced were properly admitted in the evidence.

The Supreme Court of Ohio properly overruled petitioner's motion for leave to appeal. There is therefore no substantial federal question involved, nor is there any debatable constitutional question involved herein. Under the questions presented in the petitioner's brief this Court has no jurisdiction to review this case and the petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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